TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM [redacted] 1921

No. [redacted]118

HAMILTON S. WALLACE, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS

FILED AUGUST 7, 1920.

(27,830)

(27,830)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 473.

HAMILTON S. WALLACE, APPELLANT,

vs.

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APPEAL FROM THE COURT OF CLAIMS

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 1, 1921.

1 *Petition.*

Filed April 2, 1919.

In the United States Court of Claims.

No. 34104.

HAMILTON S. WALLACE, Claimant,

vs.

UNITED STATES OF AMERICA, Defendant.

Petition.

(Filed April 2, 1919.)

The petition of Hamilton S. Wallace, claimant, respectfully shows to the Court:

1. That he is a citizen of the United States and an officer of the United States Army, to wit, a Colonel of the Quartermaster Corps thereof.

2. That your claimant has been an officer of the United States Army for a period in excess of twenty years, and on April 15th, 1912, was by the President nominated to the Senate of the United States to be Assistant Paymaster General, U. S. Army, with the rank of Colonel, to date from February 12, 1912, by promotion from his then rank of Lieutenant Colonel.

3. That the Senate of the United States confirmed said appointment and claimant was duly commissioned; that he executed his oath of office, qualified, and entered upon the duties of the said office.

2 4. That thereafter under the provisions of an Act of Congress, approved August 24, 1912, being Chapter 391 of the Acts of the Sixty-second Congress, Second Session, the office of Assistant Paymaster General was abolished, the Quartermasters Corps, Subsistence Corps and Pay Corps were consolidated, and the claimant was transferred to the Quartermaster Corps (the name of the consolidated corps) with the rank of colonel, which office he has ever since held, and to which he is now lawfully entitled.

5. That thereafter, to wit, on February 18, 1916, there was communicated to claimant through military channels an order stating that he had been dismissed from the Army by direction of the President, under the 118th Article of War.

6. That the said attempted order of dismissal was not in pursuance of the sentence of a court martial or in commutation

thereof, and that the said order did not even specify the charges upon which it was based, and claimant has not been afforded any trial, legal or otherwise, upon any such charges.

7. That after receiving said order claimant wrote a letter to the Secretary of War applying for a court martial, and later on, July 16, 1918, made a second application for court martial, setting forth on oath that he had been wrongfully dismissed, to which he received a reply dated September 17, 1918, from the Adjutant General, U. S. Army, stating that his application for court martial had been disapproved.

8. That said attempted dismissal was wrongful and — violation of claimant's legal rights and the President and Secretary of War have refused to grant him a court martial for a period of six months after fully refuses to assign

his application for same on July 16, 1918, which continued
3 refusal has rendered the order of dismissal void under the provisions of Section 1230, Revised Statutes, U. S., in such case made and provided.

9. That, to wit, on February 6th, 1919, claimant offered himself for duty and claimed his office, but was informed by letter of the Adjutant General, U. S. Army, dated March 3, 1919, that the War Department declines to recognize his claim of being an officer of the Army.

10. The claimant has been at all times ready and willing to perform the duties of his said office, but the Secretary of War wrongfully and unlawfully refuses to assign him to duty or to recognize his right to his office or to the pay and emoluments pertaining thereto.

11. That claimant is justly entitled to his salary at the rate of Five Thousand Dollars ($5,000.) per annum, from the date last paid, to wit, February 13, 1918, and also to commutation of quarters at the rate of One Thousand and Eighty Dollars ($1,080.) per annum from the same date.

12. That claimant has always borne true allegiance to the Government of the United States and has not in any way voluntarily aided, abetted or given encouragement to rebellion against said Government. That he has not assigned his claim or any part thereof and that he is justly entitled to the amount herein claimed after allowing all just credits and off sets.

13. Claimant further alleges and shows that by reason of the premises there is due and owing the claimant by the United States the sum of Six Thousand, Five Hundred and Eighty and 67/100 Dollars ($-,580.67) as salary and emoluments from February 13, 1918, to March 12, 1919, besides the costs of this suit.

14. And the claimant prays for judgment against the de-
4 fendant in the sum of Six Thousand, Five Hundred, Eighty and 67/100 Dollars ($6,580.67) to and including March 12, 1919.

HAMILTON S. WALLACE,
By FRANK S. BRIGHT,
Attorney for Claimant.
H. STANLEY HINRICKS,
Of Counsel.

DISTRICT OF COLUMBIA, *ss:*

Frank S. Bright, being sworn, deposes and says that he is attorney for the claimant in the above entitled cause; that he has read the foregoing and annexed petition, by him subscribed and knows the contents thereof, and that the statements therein made are true to the best of his knowledge, information and belief.

FRANK S. BRIGHT.

Subscribed and sworn to before me this 31st day of March, 1919.

S. L. STRUBLE,
Notary Public, D. C.

II. *General Traverse.*

No demurrer, plea, answer, counterclaim, set-off, claim of damages, demand, or defense in the premises, having been entered on the part of the defendants, a general traverse is entered as provided by Rule 34.

5 III. *Argument and Submission of Case.*

On February 19, 1920 this case was argued and submitted on merits by Mr. H. Stanley Hinrichs, for claimant, and by Mr. Richard P. Whiteley, for the defendant.

IV. *History of Proceedings After Submission.*

On March 22, 1920, the court filed findings of fact and conclusion of law dismissing petition. Judgment against claimant in the sum of $404.76 for the printing of record, with an opinion by Campbell, Ch. J.

On May 6, 1920, the claimant filed a motion for a new trial.

On June 1, 1920, the court filed an order allowing in part and overruling in part claimants's motion to amend findings of fact, vacating former findings of fact and filing new findings of fact, and ordering that opinion and judgment of March 22, 1920 stand.

Said findings of fact (as amended), conclusion of law and opinion are as follows:

6 V. *Findings of Fact (as Amended), Conclusion of Law, and Opinion of the Court by Campbell, Ch. J.*

Entered June 1, 1920.

This case having been heard by the Court of Claims the court, upon the evidence, makes the following

Findings of Fact.

I.

The plaintiff was duly and legally commissioned Assistant Paymaster General with rank as Colonel in the United States Army by the President, by and with the advice and consent of the Senate, on April 26, 1912. The Commission isued to him was in the usual form, and states: "This commission to continue in force during the pleasure of the President of the United States for the time being." He executed his oath of office on May 7, 1912, and entered upon his duties as such officer.

II.

By act of Congress approved August 24, 1912, the office of Assistant Paymaster General was abolished and plaintiff was transferred to the Quartermaster Corps, with rank of colonel, which office he continued to hold until February 13, 1918.

III.

The plaintiff served as an officer in the United States Army continuously from October 29, 1898, and was paid the salary and emoluments of his office as colonel, Quartermaster Corps, up to February 13, 1918. The salary to which he was then entitled was at the rate of $416.67 per month and the allowance to which he was entitled for commutation of quarters was then at the rate of $84 per month.

IV.

On February 8, 1918, the Secretary of War recommended to the President that the plaintiff be dismissed from the service, and the President on February 11, 1918, issued an order dismissing the
7 plaintiff from the service, which dismissal was announced by General Orders, No. 17, of February 13, 1918, and the plaintiff was notified of said order on the same day. The said order and notice to claimant did not inform him of the charges upon which his dismissal was based. At the time the above order was issued the United States was at war with Germany. On March 1, 1918, Lieut. Col. Robert S. Smith, Quartermaster Corps, was nominated by the President to the office of colonel with rank from

February 14, 1918, and on March 8, 1918, the nomination was confirmed by the Senate. This filled the complement of 21 officers allowed in that grade. The President's nomination to the Senate of Lieut. Col. Smith and another, made on March 1, 1918, is as follows:

The White House,
Washington, March 1, 1918.

"To the Senate of the United States:

"I nominate the officers herein named for promotion in the Army of the United States.

"Quartermaster Corps.

"To be Colonels.

"Lieutenant Colonel Robert S. Smith, Quartermaster Corps, with rank from February 14, 1918.

"Lieutenant Colonel Richmond McA. Scofield, Quartermaster Corps, with rank from February 23, 1918.

"To be Lieutenant Colonels.

"Major Morton J. Henry, Quartermaster Corps, with rank from *rank from* February 14, 1918.

"Major William Elliott, Quartermaster Corps, with rank from February 23, 1918."

These officers were confirmed by the Senate *in* March 8, 1918.

V.

On June 24, 1918, plaintiff made an informal application for trial by court-martial and on July 16, 1918, plaintiff made in writing an application for trial, setting forth under oath that he had been wrongfully dismissed. The said application was received by The Adjutant General of the United States Army August 5, 1918, within six months after the order of dismissal. On September 14, 1918, plaintiff's application for trial was refused by the Secretary of War, of which plaintiff was duly informed. It does not appear that the application reached the President. No court-martial was at any time convened to try the plaintiff upon the charges under which he was dismissed.

Prior to June 24, 1918, and after his dismissal, plaintiff had been advised that he could seek relief through Congress, and, until he was informed of it on that date he did not have actual knowledge of section 1230, Revised Statutes.

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VI.

On February 5, 1919, six months after the receipt by the War Department of his application for trial, a court-martial for the trial of the plaintiff had not been convened, and plaintiff then reported for duty under section 1230, Revised Statutes of the United States. The War Department refused, and continues to refuse, to recognize his claim to be an officer of the United States Army.

VII.

If the plaintiff is entitled to recover there is due him as salary from February 14, 1918, to March 12, 1919, inclusive, the sum of $5,416.71, and there is due him for commutation of quarters during the same period the sum of $1,092, making a total of $6,508.71.

Conclusion of Law.

Upon the foregoing findings of fact the court decides as a conclusion of law that the plaintiff is not entitled to recover, and that his petition ought to be, and the same is, hereby dismissed. Judgment is rendered against the plaintiff in favor of the United States for the cost of printing the record in this case, the amount thereof to be entered by the chief clerk and collected by him in the manner prescribed by law.

Opinion.

CAMPBELL, *Chief Justice*, delivered the opinion of the court:

By an order of the President, dated February 11, 1918, Col. Wallace, Quartermaster Corps, United States Army, was dismissed from the service of the United States under the provisions of the one hundred and eighteenth Article of War. The dismissal was made upon the recommendation of the Secretary of War, who stated, in his communciation, his reasons for making it. The plaintiff was notified of the President's action on February 13, 1918. In July, 1918, he made an application for trial by court-martial, setting forth, under oath, that he had been wrongfully dismissed. This application was received by The Adjutant General on August 5, 1918, was referred to the Judge Advocate General for an opinion, and that officer concluded that it should be denied. On September 7, 1918, the plaintiff was notified that his application for a court-martial had been disapproved by the Secretary of War. It does not appear that it ever reached the President.

On February 5, 1919, the plaintiff reported to The Adjutant General for duty, claiming the benefits of section 1230, Revised Statutes.

Subsequent to the order of dismissal, another officer was nominated to the Senate and confirmed by that body. By that appointment and confirmation the complement of officers allowed in the grade was filled, being 21 in number.

The question in the case is, whether the dismissal of the plaintiff by the President's order, or the nomination to and confirmation by the Senate of another, had, in either case, the effect of creating a vacany in the office held by him.

The contention on behalf of the plaintiff is that section
9 1230, Revised Statutes, sustains his right of recovery, because, it is urged, he seasonably applied, in due form, for a court-martial following the dismissal order; his application was denied; a court-martial was not convened to try him on the charges on which he was dismissed, and that, as a consequence, the order of dismissal was rendered void by force of the statute. To attain the result thus contended for it must be concluded that the order of dimissal was not effectual to create a vacancy in the office held by plaintiff at the time, but was rather a suspension until such reasonable time had elapsed within which the officer could invoke the benefits of the statute under which he asserts his claim.

It can not be seriously questioned that if a vacancy in his office was created by the officer's dismissal it could only be filled by new appointment made by the Executive, by and with the consent of the Senate. It could not be filled by legislative enactment. Woods's Case, 107 U. S., 414 (15 C. Cls., 151); Mimmack Case, 97 U. S., 426, 437; Corson Case, 114 U. S., 619, 622. Nor can it be successfully denied that the authorities establish these propositions—(1) that, unless limited by some statute the President may summarily dismiss an officer from the military service; and (2) that the President and Senate, as an incident to their constitutional power of appointment, may displace an officer and thereby create a vacancy. Whether this latter power can be limited by statute it is unnecessary here to determine.

In McElrath's case, 12 C. Cls., 201, this court, in an opinion by Judge Loring, refers to Ex parte Hennen, 13 Pet., 230, and says:

"On this authority there are two distinct constitutional powers of removal—one vested in the President and Senate as incident to their power of appointment; the other vested in the President alone, as an attribute of the executive power belonging to his office. And as to this, and probably in consequence of the construction made, the form of commissions adopted for officers of the Army and Navy and Marine Corps would seem intended to prevent all question; for now the commissions run 'for and during the pleasure of the President.' This no one can determine and declare but himself; and when he declares it the commission necessarily expires by the express terms of its limitation."

To the same effect is Gratiot's case, 1 C. Cls., 258 (decided in 1865). And the plaintiff's commission ran "to continue in force during the pleasure of the President for the time being."

The power in the President to summarily dismiss an officer is conceded in McElrath's case, 102 U. S., 426, 437.

In Mimmack's case, 97 U. S., 426, 437, it is said:

"Prior to the act of the 13th of July, 1866, the President could dismiss an officer in the military or naval service without the concurrence of the Senate."

And in Blake's case, 103 U. S., 227, 231, the court says:

"From the organization of the Government under the present Constitution to the commencement of the recent war for the suppression of the rebellion, the power of the President, in the absence of statutory regulations, to dismiss from the service an officer of the Army or Navy was not questioned in any adjudged case or by any department of the Government."

Equally positive are the cases in declaring that an officer may be displaced by the appointment of another in his place by the President, by and with the advice and consent of the Senate. Blake case, supra; McElrath case, 102 U. S., 426, 438; Keyes case, 109 U. S., 336; Mullan case, 140 U. S., 240.

Assuming that the effect of the appointment and confirmation of Col. Smith was to displace the plaintiff, the principle just stated would dispose of this case, except possibly for the short period elapsing between the date of the order of dismissal and the taking effect of the new appointment.

To dispose of the entire claim, however, it becomes necessary to determine whether section 1230 furnishes any aid to the plaintiff. We have not been referred to any case where this section, or the act of March 3, 1865, 13 Stat., 489, from which it was taken, has been construed. The Newton case, 18 C. Cls., 435, refers to it, but that case was decided upon the point that, in any event there had been too much delay in the attempted assertion of a claim by the plaintiff therein. It arose out of the exercise of an authority conferred by the act of 1870 on the President to drop from the rolls of the Army for desertion an officer absent from duty three months without leave; and while disposing of the case upon the ground mentioned, it is said (p. 444) to be the opinion of the court that the act of 1870 "was intended to give to the President a fresh grant of power to be exercised at that time, independent of the acts of 1865 and 1866."

This act of 1865 is referred to and quoted in the Blake case, but no effect is there ascribed to it as bearing upon the President's power of dismissal. There is a reference to it in section 2 of the act of June 22, 1874, 18 Stat., 191, but that section relates to the case of an officer of the Navy dismissed from the service and "restored" to the same. It does not appear how the restoration took place, and from the whole section it appears that the officer is not restored to office.

Section 1230 constitutes the revision of the 12th section of the act of March 3, 1865, 13 Stat., 489, which was as follows:

"And be it further enacted, That in case any officer of the military or naval service who may be hereafter dismissed by authority of the President shall make an application in writing for a trial, setting forth under oath that he has been wrongfully and unjustly dismissed, the President shall, as soon as the necessities of the public service may permit, convene a court-martial to try such officer on the charges on which he was dismissed. And if such court-martial shall not award dismissal or death as the punishment of such officer, the order of dismissal shall be void. And if the court-martial aforesaid shall not be convened for the trial of such officer within

six months from the presentation of his application for trial, the sentence of dismissal shall be void."

The act of July 17, 1866, 14 Stat., 92, was construed in Blake's case to be applicable only to cases of dismissal in time of peace. The plaintiff's dismissal was in time of war and is unaffected by the act of 1866. The terms of the act of 1865 do not confine it to time of peace. The terms are general. It does not express any purpose to limit the President's power to dismiss. On the contrary, it recognizes that power, and clearly imports, by its language, that there shall have been a dismissal before the officer can invoke its
11 provisions. It does not speak of suspension, but does mention dismissal.

At the time of the enactment of this act, that of July 17, 1862, 12 Stat., 596, was in full force, and by the latter the President had been "authorized and requested to dismiss and discharge from the military service" any officer whose dismissal, in his judgment, would promote the public service. Its force is to be found in the word "requested." Blake case, 103 U. S., 227, 234.

It is not to be presumed, nor does the language of the act indicate, that the power which Congress had thus in 1862, in time of war, requested the President to employ, was intended to be taken away from him or limited in 1865, the war then continuing. And the history of the enactment confirms this view.

The section under consideration was incorporated in the act by a committee of conference, in composition of differences between the two Houses of Congress (Cong. Globe, 38th Cong., 1378). A great deal of discussion upon different bills relative to dismissals of officers had occurred in the two Houses (Cong. Globe, 38th Cong. 138, 128, 36, 134 5). Reporting the results of conference to the Senate Senate Wilson stated that the House had adopted an amendment which required a trial upon charges before dismissal, that the committee of conference had modified the amendment and agreed "that the power to dismiss an officer shall not be taken away, but that if he makes application for a trial after his dismissal by the President he may have a court-martial."

One Senator facetiously stated that the report was perfectly clear to him and meant that if the court-martial did not acquit the officer or shoot him, "the President may reinstate him, and after he is shot the reinstatement will — amount to very much!"

But while the language of the act justifies the conclusion that the power to dismiss an officer was not taken away, his reinstatement is not left to stand upon the action of a court-martial, as the Senator suggested, because the order of dismissal, it is declared, shall be void if a court-martial be not convened. Nor, indeed, does the act contemplate any execution of a sentence of a court-martial if convened. It declares that the order of dismissal "shall be void" if the court-martial does not award dismissal or death, but implies that the President's order shall stand if the court-martial's sentence should call for severer punishment. In other words, the effect upon the order of dismissal is the same whether the court-martial be not convened at all, or, being convened, award a different punishment than mere dismissal.

Manifestly the language is not aptly chosen, and the meaning to be ascribed to the act is obscure. If it be assumed that it was not its intention to limit the power of dismissal (and its terms certainly import that it treats the dismissal as a fact) then the declaration that this order of dismissal shall be void, because of something subsequently occurring, could not be effective to restore the officer to his office. Let it once be admitted that the officer was dismissed from the service, and it must follow that the effect of the order dismissing him was to sever his relations with the Army. As was said in Corson's Case:

"Thenceforward and until in some lawful way again
12 appointed he was disconnected from that branch of the public service as completely as if he had never been an officer of the Army."

The vacancy so created could only have been filled by a new and original appointment, to which, by the Constitution, the advice and consent of the Senate was necessary. Corson Case, 114 U. S., 619, 622.

If it be said that the language of the act, though specific in its reference, does not imply that the officer is or can be dismissed by the President's order, but means that the order has the effect of only suspending him from duty, then the act provides no method of determining the status of the officer if he fails to demand a court-martial; nor does it provide, if a court-martial be convened, for any execution of its award.

Assuming the officer is dismissed, and therefore severed from the service, the act presents the situation of a person out of the service being entitled to trial by court-martial upon his own request. Those subject to military law, as well as the jurisdiction of courts-martial, are defined by the Articles of War (39 Stat., 651). It is certainly the general rule that the military law is applicable to military persons alone, and that they cease to be amenable to it after their separation from the service. Davis Mil. Law, 46, 58, Art. V, Constitution.

We have pointed out some of the difficulties that would attend the act in its practical operation; and since the restoration of an officer who has been lawfully dismissed from his office requires a new appointment, it would seem that the act, or section 1230, does not, in any event, affect the office that was held by the dismissed officer or entitle him to its emoluments. But whether the purpose of this section is fully met by a court-martial, properly so called, or a court of inquiry, or some other body authorized by an order of the President, whose findings can go to the officer's record, or make him eligible to reappointment, or whether a broader meaning should be accorded to it, we need not determine, because our opinion is that section 1230 is superseded by the Articles of War enacted as part of the act of August 29, 1916, 39 Stat., 651, 669. This act in express terms repeals all laws or parts of laws inconsistent with its provisions; and as it recognizes and declares, in the one hundred and eighteenth article, the power in the President to summarily dismiss an officer in time of war it must be accepted as the latest legis-

lative expression on that subject, and this with other of its provisions renders section 1230 inoperative.

It results that as the plaintiff was dismissed from the Army in time of war by a valid order of the President, and as he has not been reappointed in the mode prescribed by law, he is not entitled to the pay allowed to an officer in the service for the period in question. His petition is therefore dismissed.

Graham, Judge; Hay, Judge; Downey, Judge; and Booth, Judge, concur.

13 VI. *Judgment of the Court.*

At a Court of Claims held in the City of Washington on the First day of June, A. D., 1920, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises find in favor of the defendant, and do order, adjudge and decree that Hamilton S. Wallace, as aforesaid, is not entitled to recover any sum in this action of and from the United States; and that the petition herein be and it hereby is dismissed: And it is further ordered, adjudged and decreed that the United States shall have and recover of and from Hamilton S. Wallace, as aforesaid, the sum of Four Hundred and Four Dollars and seventy-six cents ($404.76), the cost of printing the record in this court, to be collected by the Clerk, as provided by law.

By THE COURT.

VII. *Claimant's Application for and Allowance of an Appeal.*

To the Chief Justice and Judges of the Court of Claims:

Claimant hereby prays an appeal to the Supreme Court of the United States from a judgment of this court rendered on the 1st day of June, 1920, reaffirming a judgment rendered on the 22nd day of March, 1920, by which the petition was dismissed.

FRANK S. BRIGHT,
Attorney for Claimant.

H. STANLEY HINRICHS,
Of Counsel.

Filed July 27, 1920.

Ordered: That the above appeal be allowed as prayed for.

July 30, 1920.

EDWARD K. CAMPBELL,
Chief Justice.

14 Court of Claims.

No. 34104.

HAMILTON S. WALLACE

vs.

THE UNITED STATES.

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the findings of fact, conclusion of law and opinion of the court by Campbell, Ch. J.; of the judgment of the court; of the claimant's application for and the allowance of an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this 2nd day of August A. D., 1920.

[Seal of the Court of Claims.]

F. C. KLEINSCHMIDT,
Assistant Clerk Court of Claims.

Endorsed on cover: File No. 27,830. Court of Claims. Term No. 473. Hamilton S. Wallace, appellant, vs. The United States. Filed August 7th, 1920. File No. 27,830.